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# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 824

PAN AMERICAN-GRACE AIRWAYS, INC., AND BRANIFF AIRWAYS, INC., PETITIONERS

*v.*

CIVIL AERONAUTICS BOARD, LUFTHANSA GERMAN AIRLINES, PAN AMERICAN WORLD AIRWAYS, INC., AND MASTER EXECUTIVE COUNCILS OF PILOTS OF BRANIFF AIRWAYS, INC., AND PAN AMERICAN-GRACE AIRWAYS, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. 7a–23a) and the order of the Civil Aeronautics Board (Pet. 24a–26a) are not yet reported.

### JURISDICTION

The judgment of the court of appeals (Pet. 27a) was entered on October 30, 1964, and a timely petition for rehearing *en banc* was denied on December 11, 1964 (R. 2045–A). The petition for a writ of certiorari was filed on January 13, 1965. The juris-

diction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Civil Aeronautics Board is required to consider in a comparati hearing, and make simultaneous recommendatior to the President concerning the grant or denial of, applications for international air routes filed by foreign air carriers pursuant to international agreement, and those filed by citizen air carriers for the same air route, in light of the different statutory provisions and considerations involved in the disposition of such applications.

2. If comparative consideration and simultaneous recommendations are required when grant of a foreign carrier application would preclude economic operations by a citizen carrier seeking authority to serve the same route, whether petitioners have established economic mutual exclusivity with respect to the foreign carrier application here involved.[1]

## STATUTE INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958, 72 Stat. 731, 49 U.S.C. 1301, *et seq.*, are set forth in Appendix A, *infra*, pp. 17–26.

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[1] In addition, a jurisdictional question is presented which was not reached by the court below—whether Section 1006 of the Federal Aviation Act, barring judicial review of "any order in respect of any foreign air carrier subject to the approval of the President," precludes review of the present interlocutory procedural order entered in a proceeding in which the final order would be covered by Section 1006. See pp. 15–16, *infra*.

## STATEMENT

The operation of international air routes depends upon the exchange of reciprocal operating rights between nations. In the case of the United States, these rights for the most part are set forth in executive agreements (so-called "bilaterals") entered into with the other nations involved, and pursuant to which each nation designates its carrier or carriers to operate the routes specified therein. However, neither a foreign nor a citizen carrier may conduct common carrier operations to and from the United States until authorized by the Board to do so after notice and hearing on its application. Section 402 of the Federal Aviation Act (*infra,* p. 20) governs applications by foreign carriers, Section 401 (*infra,* p. 19) governs applications by citizen carriers, and the ultimate disposition of both types of application for foreign operations is committed to the President by Section 801 (*infra,* p. 22). *C. & S. Air Lines* v. *Waterman Corp.,* 333 U.S. 103. Section 1006(a) (*infra,* p. 23) withholds jurisdiction from the courts of appeals to provide review of "any order in respect of any foreign air carrier subject to the approval of the President," and in *Waterman, supra,* this Court held that review could not be had of an order approved by the President granting and denying applications of citizen carriers.

Section 802 (*infra,* p. 22) requires the Secretary of State to consult with the Board with respect to the negotiation of agreements "with foreign governments for the establishment * * * of * * * air routes and services," and Section 1102 (*infra,* p. 24) requires the

Board to act "consistently with any obligation assumed by the United States in any [effective] treaty, convention, or agreement." Nonetheless, the Board does not consider that it is required to recommend issuance of a foreign carrier permit to the President merely because there is an agreement therefor. Rather, Section 402(b) provides that the "Board is empowered to issue such a permit if it finds that" the foreign "carrier is fit, willing, and able" and that the "transportation will be in the public interest." The Board accordingly permits interested citizen carriers to intervene in foreign permit proceedings, and to adduce evidence in opposition to the application on any public interest ground. Its findings with respect to such grounds for opposition are included in its decision which is transmitted to the President for his approval.

However, the existence of a bilateral agreement represents a *prima facie* public interest factor pointing to the grant of the application of the carrier designated by the foreign government to operate the route, and a strong showing would be required to warrant a recommendation to the President by the Board that the application should be denied or the bilateral denounced. See *British Overseas Airways, Foreign Permit Amendment,* 29 C.A.B. 583. Further, since the foreign nation designates the carrier, there is no rivalry between applicants for the same award under the bilateral. Accordingly, foreign air carrier permit applications normally are heard separately and on an expedited basis, and the principal issue in the event of contest is whether the overall

public interest requires a recommendation to the President for denial despite the existence of the bilateral.[2] This nation's selection of the United States carrier or carriers to operate the routes provided for in bilateral agreements is made in the form of a certificate of public convenience and necessity issued pursuant to Section 401 with the approval or at the direction of the President, and, where more than one United States carrier seeks a certificate for the same route, the applications normally are heard together. The Board does not, however, hear the applications of foreigners and citizens in the same proceeding, and has never deemed such applications to be rival ones in the sense of requiring comparative consideration in a single proceeding under the rule of *Ashbacker Radio Co.* v. *Federal Communications Commission,* 326 U.S. 327.

The bilateral agreement between the United States and Germany, entered into in 1955 (7 U.S.T. & O.I.A. 527), provides for U.S. routes to and through Germany to points beyond, and American carriers have heretofore been accorded rights thereunder. Similarly, provision is made for routes from Germany to the United States "and beyond to points in the Carib-

[2] The procedures of the other nations in granting reciprocal operating rights to our carriers ordinarily are far less formal and time-consuming than are the procedures employed by this government pursuant to Section 402. Accordingly, one of the reasons why foreign air carrier permits are heard on an expedited basis is to avoid delays which are the source of irritation to the foreign governments, which could lead to retaliatory action, and which would impair our ability to negotiate effective exchanges of air routes. See the letter from the Secretary of State, Appendix B, *infra*, pp. 27–30.

bean Sea, and beyond to South America" (*id.* at 557). On March 10, 1964, Lufthansa filed with the Board the application here involved (J.A. 5, 7) requesting that its route from Europe to New York be extended in accordance with the bilateral from New York to Santiago, Chile, via points in Jamaica, Ecuador, and Peru. Petitioners, who conduct operations along the west coast of South America, sought and were granted leave to intervene in the proceedings on the Lufthansa application (J.A. 44).[3] Braniff also filed with the Board a motion to defer action until after the Board's pending *United States-Caribbean-South America Investigation,* Docket No. 12,895 (the *Route Investigation*), or, alternatively, to consolidate the Lufthansa application into that proceeding. The *Route Investigation* is a complex reexamination of the pattern of United States flag services between the United States and South America, and involves difficult questions as to the number and identity of the United

[3] The present pattern of United States flag service to South America consists of operations by Pan American World Airways over routes from New York and Miami to Rio de Janeiro and Buenos Aires, primarily via the east coast of South America; by Panagra from the Canal Zone to Buenos Aires via the west coast of South America; and by Braniff from Miami to Rio de Janiero and Buenos Aires, also via the west coast. By interchange with other United States carriers, Panagra and Braniff provide through one-plane service from New York and Miami to the South American points served by them.

States carriers to operate to South America and the routes to be flown by them.[4]

The order instituting the *Route Investigation* (Order E–17289, J.A. 54) suggested that the present pattern of service by three United States carriers to South America was not required. Rather, the desirable situation was indicated to be one in which two independent United States carriers operate from the mainland—one via the east coast of South America, and the other via the west coast, serving the present routes of Panagra and Braniff in South America from Miami and New York. The Board also pointed out that there were some 19 South American foreign carriers authorized to operate to the United States, that these services and the ones conducted by them in South America diluted the potential economic support for operations by United States carriers, and that the existing United States flag operations are "marginal economically." (J.A. 56.)

Braniff and Panagra have filed applications for the suggested New York-Miami-West Coast route, and the Braniff motion contended that comparative considera-

[4] Following the institution of the *Route Investigation* (in which hearings are scheduled to begin in April 1965), this Court entered its decision in *Pan American World Airways* v. *United States*, 371 U.S. 296, holding that resolution of the question of whether Pan American and Grace should be permitted to control Panagra was a matter for the Board to determine rather than the courts. This question is the subject of a separate Board investigation (*Panagra-Pan American-Grace Investigation*, Docket No. 14,641). Hearings therein are not expected to commence until the beginning of 1966. An ultimate determination of the United States carrier route pattern to South America cannot be expected for some time.

tion of the Lufthansa application with its proposal was required by the *Ashbacker* principle since a grant of the Lufthansa application might preclude a grant of one or more applications by United States carriers. The Board denied the motion, finding, *inter alia,* that "[a]ssuming, *arguendo,* that the *Ashbacker* Doctrine is applicable to this type of situation, there is no showing that the Braniff and Lufthansa applications are mutually exclusive as a matter of economics" (Pet. 25a). Rather, the Board pointed out that Lufthansa's transportation of so-called "fifth freedom" traffic between New York and South America would be limited by the capacity provisions of the bilateral agreement, in that the carrier's capacity between the U.S. and South American market must be tailored to the traffic demands between Germany and the South American points in question.[5] Hence, the operation would be a "sharply restricted" one, and not "primarily designed to accommodate the needs of New York-South America traffic." Also, the Board found that the public interest aspects of the Lufthansa application could be assessed without reference to the *Route Investigation,* and that deferral of proceedings would be inconsistent with the policy of giving expedited treatment to such foreign applications.

The court of appeals dismissed the petitions for review for want of jurisdiction. The majority opinion pointed out that the Board's order was a proce-

[5] "Fifth freedom" traffic for any carrier is traffic which does not originate or terminate at points in the carrier's homeland.

dural one ordinarily not subject to immediate review (Pet. 10a). It held that the petitioners were not entitled to obtain review on grounds of denial of a present procedural right because they "are not * * * entitled to an *Ashbacker* hearing with Lufthansa" (Pet. 11a) in view of the "different considerations" applicable to the disposition of that application and those of the petitioners in the *Route Investigation.* The court stated that the issues in the *Route Investigation* involve public interest factors which "are primarily economic" (Pet. 13a), whereas the Lufthansa application involves "the policy and obligations of the United States set forth in the bilateral Agreements." The court concluded that "neither our obligations under bilateral Agreements nor the motives for concluding them are subjects for comparative hearings," and hence did "not reach the issues of mutual exclusivity" (*id.*).

The Board had pointed out to the court that petitioners were free to urge on the basis of evidence that the Lufthansa application should be denied or deferred because of impact on the *Route Investigation,* and that the Board's evaluation of any such contentions would be set forth in its opinion to be transmitted to the President. The court held (Pet. 13a) that "the avenue open to petitioners through their permitted intervention in the Lufthansa case before the Board cannot now be said by us to be so restricted that petitioners will be precluded from making available to the Board, and through the Board to the President, such matters affecting the public

interest as will meet the requirements of due process of law."[6]

Judge McGowan dissented (Pet. 14a), being of the view that the statute did not make *Ashbacker* inapplicable and that the Board was required to afford petitioners an opportunity in a comparative hearing "to make the affirmative case in support of their own applications" to demonstrate that they could "furnish a better and cheaper service than the foreign carrier" (Pet. 22a), and thus to persuade the Board that it should recommend to the President denunciation of the international agreement (Pet. 20a–21a). He believed that the petitioners' opportunity to urge deferral or denial of the Lufthansa application before the Board in the foreign carrier's separate proceeding was an inadequate alternative (Pet. 16a, 22a).

## ARGUMENT

The court of appeals correctly held that Lufthansa's application for an international air route, filed pursuant to international agreement, could be considered by the Board apart from the Board's protracted in-

[6] Judge Wright concurred in the majority opinion written by Judge Fahy (Pet. 14a). He was of the further view that the petitions for review constituted an attempt to circumvent the prohibition contained in Section 1006 against judicial appeal from the President's disposition of the Lufthansa application. He also agreed with the position expressed below by the Secretary of State that the delays occasioned through acceding to the petitioners' views would frustrate executive action with respect to this nation's contract obligation to the West German government embodied in the outstanding bilateral agreement, and stated that "[i]t was precisely to prevent this type of embarrassment to the conduct of our foreign affairs that the Congress denied judicial appeal from Board action on international routes" (*id.*).

vestigation of the pattern of U.S. flag air carrier service involving in part the same route. Petitioners can fully protect their interests by participating in the Lufthansa proceeding. And any other result would have serious adverse impact upon our international air relations. Further review by this Court is not warranted.

1. As the court below held, the "considerations [which] bear upon Lufthansa's application and those of petitioners" are so "different" (Pet. 11a) as to preclude any requirement of comparative hearing. The licenses sought are issued under different statutory provisions (Lufthansa—Section 402; petitioners—Section 401), and there is no rivalry between Lufthansa and petitioners either in the sense that they are candidates for selection on the basis of comparative ability, or in that the licenses would be "mutually exclusive" under the *Ashbacker* case,[7] *i.e.*, that the grant of one will compel the denial of the other in terms of conventional licensing criteria. If our carriers are to operate abroad, the carriers of other nations must be permitted to operate to this nation. This elementary principle of reciprocity constitutes the foundation of our foreign air transportation system, and this nation seldom grants a foreign air carrier permit for any purpose other than to obtain or retain rights for our carriers. As found below (Pet.

[7] *Ashbacker Radio Co.* v. *Federal Communications Comm'n*, 326 U.S. 327, required comparative consideration betwen physically "mutually exclusive" applications for radio licenses. As petitioners point out, the same rule has been applied to require comparative hearing of conflicting applications by domestic air carriers for the same route.

12a–13a), the selection of which American carrier or carriers should operate to South America involves "primarily economic" considerations, whereas disposition of the Lufthansa application "involves Presidential consideration of our international relations with Germany as they arise with respect both to Lufthansa and American domestic carriers operating abroad." In other words, our government may agree to grant routes to a foreign air carrier despite economic considerations which point in the opposite direction, solely because of reciprocal desires on our part or other foreign policy factors. Hence, "comparative considerations, bearing primarily upon economics, would do little to dilute the public interest factor which perhaps weighs most heavily, * * * the policy and obligations of the United States set forth in the bilateral Agreements" (Pet. 13a).

The fact that the Aviation Act's overall statement of policy (Section 102, *infra*, p. 18) lists the same public interest factors for Board consideration, "among other things," in disposing of applications by foreign and citizen carriers affords no basis for concluding that, because *Ashbacker* has been held applicable to Section 401 applications, it perforce must be applied to such applications *vis-à-vis* Section 402 ones. As the court below recognized (Pet. 12a–13a), the "public interest has many facets," and Section 102 vests broad discretion in the Board. The Act itself recognizes the critical differences in considering foreign air carrier applications, for it provides (Section 1102, *infra*, p. 24) that the Board shall exercise its powers "consistently with any obligation assumed by

the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country * * *." Contrary to petitioners' argument (Pet. 10), we do not contend that Section 1102 overrides the Act's public interest criteria. Rather, Section 1102 embodies a critical facet of the public interest which distinguishes foreign and domestic carrier applications as a matter of law. The decision below recognizes that the international commitments by this nation and the benefits to the entire air transportation system embodied in a bilateral agreement constitute important public interest factors which properly are taken into account by the Board in processing an application under Section 402, and that the established procedure under which a citizen carrier may oppose a foreign application before the Board on any public interest ground, and before the President through the Board, satisfies all statutory and due process requirements.

2. In his concurring opinion below, Judge Wright stressed another section of the Act distinguishing foreign air carriers—Section 1006 (*infra,* p. 23), which excludes from judicial review "any order in respect of any foreign air carrier subject to the approval of the President". The purpose of this provision was to avoid "embarrassment to the conduct of our foreign affairs" (Pet. 14a), a point which was spelled out in detail by the letter of the Secretary of State reprinted as Appendix B to this brief, *infra,* pp. 27–30. The result of ordering a comparative hearing in this case would be to consolidate Lufthansa's request with a complicated and lengthy proceeding about the pat-

tern of United States flag air service to South America, and the choice of the best United States carriers for such service. Not only are the issues far different, but the protracted delay would indeed embarrass our international relations.

In contrast, petitioners' interests do not require a comparative hearing. As the court correctly determined (Pet. 13a), the permission granted to petitioners to oppose the Lufthansa application in the Board's proceeding constitutes a sufficient opportunity to urge to the President through the Board any relevant economic considerations militating against a grant, and satisfies any due process requirements. There is no contention here that the President will be unaware of petitioners' position or of any economic factors which they may urge. Thus, if considerations of national interest dictate the denial of Lufthansa's application, the withholding of action upon it until the American flag pattern is determined, or a remand to the Board for more information, the President can be expected to so recognize and to act in appropriate fashion. This is a matter, we submit, which the Act "subjects to presidential, rather than judicial review" (*Pan American World Airways* v. *United States,* 371 U.S. 296, 310). It is not the function of the judiciary to give or compel "advice that the President has not asked, tendered at the demand of a private litigant, on a subject concededly within the President's exclusive, ultimate control." *C. & S. Air Lines* v. *Waterman Corp.,* 333 U.S. 103, 113.

3. Even if *Ashbacker* applied, and comparative hearing would be required on mutually exclusive ap-

plications filed by foreign and domestic air carriers, petitioners have failed to show that a grant of the Lufthansa application will in fact compel a denial of, or seriously prejudice, their applications. The court of appeals did not reach this point (Pet. 13a). The Board's determination was to the contrary (Pet. 25a) because the German bilateral requires Lufthansa's capacity to be tailored to the traffic demands between Germany and the South American points involved, rather than permitting unrestricted operations designed to accommodate New York-South America traffic. Also, the numerous foreign carrier operations already being conducted over the route, and the fact that considerations other than traffic ones will weigh heavily in the determination of proper American flag pattern, make tenuous indeed any assumption that a grant of the *Lufthansa* application will affect the outcome of the *Route Investigation* one way or the other.

4. Finally, there is a serious jurisdictional obstacle to review of petitioners' claim for a consolidated hearing, not reached by the lower court. Under Section 1006, the final order in the proceeding on Lufthansa's application is excepted from the statutory judicial review. In one case, the court below dismissed an *Ashbacker* claim when the proceedings involved citizen applications subject to Presidential decision, on the ground that the controversy related to matters which were for the President's determination and hence not reviewable under *C. & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103. See *United States Overseas Air lines* v.

*Civil Aeronautics Board*, 222 F. 2d 303 (*C.A. D.C.*).[8] Foreign air carriers call into play the statutory exception and review should be barred *a fortiori*.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1965.

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[8] In an earlier case involving citizen air carriers, the *Ashbacker* claim was denied, as here, because there was no showing of any deprivation of procedural right. *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. 2d 777 (C.A. D.C.).

Since *Waterman*, the government has suggested, with respect to review of orders approved by the President, that review may be had, after the President has acted, on the limited question of whether the President and the Board have exceeded their constitutional and statutory authority. See *Alaska Airlines* v. *Pan American World Airways*, 321 F. 2d 394 (C.A. D.C.); *British Overseas Airways Corp.* v. *Civil Aeronautics Board*, 304 F. 2d 952 (C.A. D.C.). No such claim is, or could be, made in this case.

## APPENDIX A

The relevant provisions of the Federal Aviation Act of 1958 (72 Stat. 731, as amended, 49 U.S.C. 1301, *et seq.*):

### TITLE I—GENERAL PROVISIONS

#### DEFINITIONS

SEC. 101. [72 Stat. 737, 49 U.S.C. 1301] As used in this Act unless the context otherwise requires—

* * * * *

(19) "Foreign air carrier" means any person, not a citizen of the United States, who undertakes, whether directly or indirectly or by lease or any other arrangement, to engage in foreign air transportation.

* * * * *

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the airspace over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof;

whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

* * * * *

DECLARATION OF POLICY: THE BOARD

SEC. 102. [72 Stat. 740, 49 U.S.C. 1302] In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs

of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

* * * * *

## TITLE II—CIVIL AERONAUTICS BOARD: GENERAL POWERS OF BOARD

* * * * *

### General Powers and Duties of the Board

#### GENERAL POWERS

SEC. 204. [72 Stat. 743, 49 U.S.C. 1324] (a) The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this Act, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this Act.

* * * * *

## TITLE IV—AIR CARRIER ECONOMIC REGULATION

### Certificate of Public Convenience and Necessity

#### CERTIFICATE REQUIRED

SEC. 401. [72 Stat. 754, as amended by 76 Stat. 143, 49 U.S.C. 1371] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the

Board authorizing such air carrier to engage in such transportation.

* * * * *

ISSUANCE OF CERTIFICATE

(d)(1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

* * * * *

PERMITS TO FOREIGN AIR CARRIERS

PERMIT REQUIRED

SEC. 402. [72 Stat. 757, 49 U.S.C. 1372] (a) No foreign air carrier shall engage in foreign air transportation unless there is in force a permit issued by the Board authorizing such carrier so to engage.

ISSUANCE OF PERMIT

(b) The Board is empowered to issue such a permit if it finds that such carrier is fit, willing, and able properly to perform such air

transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation will be in the public interest.

APPLICATION FOR PERMIT

(c) Application for a permit shall be made in writing to the Board, shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the Board shall by regulation require.

NOTICE OF APPLICATION

(d) Upon the filing of an application for a permit the Board shall give due notice thereof to the public by posting a notice of such application in the office of the secretary of the Board and to such other persons as the Board may by regulation determine. Any interested person may file with the Board a protest or memorandum of opposition to or in support of the issuance of a permit. Such application shall be set for public hearing and the Board shall dispose of such application as speedily as possible.

TERMS AND CONDITIONS OF PERMIT

(e) The Board may prescribe the duration of any permit and may attach to such permit such reasonable terms, conditions, or limitations as, in its judgment, the public interest may require.

AUTHORITY TO MODIFY, SUSPEND, OR REVOKE

(f) Any permit issued under the provisions of this section may, after notice and hearing, be altered, modified, amended, suspended, canceled, or revoked by the Board whenever it finds such action to be in the public interest. Any

interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, modification, amendment, suspension, cancellation, or revocation of a permit.

TRANSFER OF PERMIT

(g) No permit may be transferred unless such transfer is approved by the Board as being in the public interest.

* * * * *

## TITLE VIII—OTHER ADMINISTRATIVE AGENCIES

THE PRESIDENT OF THE UNITED STATES

SEC. 801. [72 Stat. 782, 49 U.S.C. 1461] The issuance, denial, transfer, amendment, cancellation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof.

THE DEPARTMENT OF STATE

SEC. 802. [72 Stat. 783, 49 U.S.C. 1462] The Secretary of State shall advise the Administrator, the Board, and the Secretary of Commerce, and consult with the Administrator, Board, or Secretary, as appropriate, concerning the negotiations of any agreement with foreign govern-

ments for the establishment or development of air navigation, including air routes and services.

* * * * *

## TITLE X—PROCEDURE

### Conduct of Proceedings

Sec. 1001. [72 Stat. 788, 49 U.S.C. 1481] The Board and the Administrator, subject to the provisions of this Act and the Administrative Procedure Act, may conduct their proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. No member of the Board or Agency shall participate in any hearing or proceeding in which he has a pecuniary interest. Any person may appear before the Board or Agency and be heard in person or by attorney. The Board, in its discretion, may enter its appearance and participate as an interested party in any proceeding conducted by the Administrator under title III of this Act, and in any proceeding conducted by the Administrator under title VI of this Act from which no appeal is provided to the Board. Every vote and official act of the Board and the Agency shall be entered of record, and the proceedings thereof shall be open to the public upon request of any interested party, unless the Board or the Administrator determines that secrecy is requisite on grounds of national defense.

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### Judicial Review of Orders

#### ORDERS OF BOARD AND ADMINISTRATOR SUBJECT TO REVIEW

Sec. 1006. [72 Stat. 795, as amended by 74 Stat. 255, 75 Stat. 497, 49 U.S.C. 1486] (a) Any order, affirmative or negative, issued by the Board or Administrator under this Act, ex-

cept any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

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## TITLE XI—MISCELLANEOUS

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### International Agreements

Sec. 1102. [72 Stat. 797, 49 U.S.C. 1502] In exercising and performing their powers and duties under this Act, the Board and the Administrator shall do so consistently with any obligation assumed by the United States in any treaty, convention, or agreement that may be in force between the United States and any foreign country or foreign countries, and shall take into consideration any applicable laws and requirements of foreign countries and the Board shall not, in exercising and performing its powers and duties with respect to certificates of convenience and necessity, restrict compliance by any air carrier with any obligation, duty, or liability imposed by any foreign country: *Provided,* That this section shall not apply to any obligation, duty, or liability arising out of a contract or other agreement, heretofore or hereafter entered into between an air carrier, or any officer or representative thereof, and any foreign country, if such contract or agreement is disapproved by the Board as being contrary to the public interest.

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FOREIGN AIRCRAFT

SEC. 1108. [72 Stat. 798, 49 U.S.C. 1508] (a) The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction. Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.

(b) Foreign aircraft, which are not a part of the armed forces of a foreign nation, may be navigated in the United States by airmen holding certificates or licenses issued or rendered valid by the United States or by the nation in which the aircraft is registered if such foreign nation grants a similar privilege with respect to aircraft of the United States and only if such navigation is authorized by permit, order, or regulation issued by the Board hereunder, and in accordance with the terms, conditions, and limitations thereof. The Board shall issue such permits, orders, or regulations to such extent only as it shall find such action to be in the interest of the public: *Provided, however,* That in exercising its powers hereunder, the Board shall do so consistently with any treaty, convention, or agreement which may be in force between the United States and any foreign country or countries. Foreign civil aircraft permitted to navigate in the United States under this subsection may be authorized by the Board to engage in air commerce within the United States except that they shall not take on at any point within the United States, persons, property, or mail carried for compensation or hire and destined for another point within

the United States. Nothing contained in this subsection (b) shall be deemed to limit, modify, or amend section 402 of this Act, but any foreign air carrier holding a permit under said section 402 shall not be required to obtain additional authorization under this subsection with respect to any operation authorized by said permit.

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## APPENDIX B

SECRETARY OF STATE,
*Washington, July 1, 1964.*

DEAR MR. ATTORNEY GENERAL: It has come to the attention of the Department of State that the Court of Appeals for the District of Columbia Circuit has recently issued an order staying the proceedings of the Civil Aeronautics Board in the application for amendment of a foreign air carrier permit to authorize a route granted in a bilateral agreement between the United States and the Federal Republic of Germany. The Court's order arose out of a denial by the Civil Aeronautics Board of motions of two United States carriers—Braniff and Panagra—to postpone consideration of the application of Lufthansa to extend its transatlantic services beyond stated points in the United States to points in the Caribbean Sea and in South America. The Civil Aeronautics Board had granted Panagra and Braniff leave to intervene in the procedings on the Lufthansa application, but had denied the motion to defer consideration of the Lufthansa application until after conclusion of the United States-Caribbean-South American investigation—the so-called *South America Route case.*

We are informed that the Court of Appeals will hear the case on the merits in September, with decision later in the fall. We are further informed that hearings on the *Route case*—a major proceeding involving the structure of United States flag air operations south of the United States—will not commence until the beginning of 1965 and that a final decision by the Board, with approval by the President, can-

not reasonably be expected before sometime in 1966. Thus, if the stay order of the Court of Appeals is permitted to remain in effect, the hearing on the Lufthansa application would be postponed for a number of months. If the decision of the Court on the merits were that hearings on the Lufthansa application must be deferred until conclusion of the *Route case* or must be consolidated with that case, the result would be to postpone the hearings on Lufthansa's application for at least two years.

It is our view that any substantial delay in the processing of Lufthansa's application, whether for a period of months or years, will severely compromise our international aviation relations and will impair our ability to negotiate effective exchanges of air routes with other countries. Doubt would be cast on our reliability in complying with the obligations set forth in our bilateral agreements; the value of route grants by the United States to foreign carriers would be significantly reduced; and the operations of our carriers over routes granted by foreign countries would be subjected to dilatory or other retaliatory measures.

Under our system of bilateral air transport agreements, the United States obligates itself to grant operating permission to the carrier of the other contracting government if that carrier can qualify before the Civil Aeronautics Board and if it meets certain conditions set forth in the agreement. In accordance with these arrangements, the United States Government has maintained a consistent policy of separate and expeditious treatment of foreign air carrier applications pursuant to a bilateral agreement. The Civil Aeronautics Board has never linked the grant of foreign air carrier permits to proceedings involving the certification of United States flag carriers. The Civil Aeronautics Board can of course

conclude that service over a route granted in the bilateral agreement would not be in the public interest. But this would require a holding, approved by the President, that the international agreement itself is not in the public interest and that steps should be taken to withdraw from the agreement or to modify it. So long as the agreement remains in effect, the United States cannot, in our view, be put in the position of telling a foreign country with which we have an international agreement that the question of whether the United States will comply with the agreement must be deferred for a period of years, pending consideration of long-range plans for operations by United States flag carriers. In short, linking the foreign air carrier applications to independent proceedings concerning United States carriers would effectively prevent the United States from complying with its international obligations in the aviation field. While a deferral for a period of months, resulting from the stay order, would not be as serious as a delay of several years, the adverse effect upon our international aviation relations will nonetheless be significant.

In this connection, I should like to emphasize the reverse side of the coin, that is the importance to United States carriers of securing prompt authorization to operate in foreign countries over routes negotiated in international agreements. We have consistently maintained, where necessary by diplomatic representations, that there should be no undue delay in granting operating permission for United States carriers over routes negotiated in a bilateral agreement. We have already received a strong diplomatic protest from the Federal Republic of Germany in the present case, and we could anticipate similar protests, possibly followed by retaliatory action, by

other countries in the event the Court of Appeals decision were upheld and applied to other situations.

The United States has a network of bilateral agreements with over 50 countries, each one reflecting a delicately balanced exchange of economic benefits. We should be careful not to upset these balances. I therefore urge that you make a strong effort to secure reversal of the order of the Court of Appeals in this case. In the alternative, I would urge that you pursue the suggestion of the Civil Aeronautics Board, whereby at least the initial phases of the administrative proceedings could go forward, pending full consideration on the merits by the court.

I would appreciate it if you would keep me advised of the further proceedings in this case.

Sincerely yours,

/s/ DEAN RUSK.

The Honorable ROBERT F. KENNEDY,
*Attorney General.*

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